

**MINUTES  
of the  
FIRST MEETING  
of the  
TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE**

**June 11, 2013  
Room 321, State Capitol**

**D** The first meeting of the Tobacco Settlement Revenue Oversight Committee (TSROC) for the 2013 interim was called to order by Representative Elizabeth "Liz" Thomson, co-chair, on Tuesday, June 11, 2013, at 10:13 a.m. in Room 321 of the State Capitol in Santa Fe.

**Present**

Sen. Cisco McSorley, Co-Chair  
Rep. Elizabeth "Liz" Thomson, Co-Chair  
Rep. Monica Youngblood

**Absent**

Rep. Gail Chasey  
Sen. John C. Ryan  
Sen. John Arthur Smith

**Advisory Members**

Rep. Paul C. Bandy  
Rep. Kelly K. Fajardo  
Sen. Linda M. Lopez  
Sen. Mary Kay Papen  
\*Rep. Jim R. Trujillo

\*promoted to a voting member for this meeting

**Staff**

Shawn Mathis, Staff Attorney, Legislative Council Service (LCS)  
Elizabeth Katz, LCS  
Abby Wolberg, LCS

**Guests**

The guest list is in the archived meeting file.

**Handouts**

Copies of all handouts are in the meeting file.

**Tuesday, June 11**

**Call to Order**

**T** Representative Thomson called the meeting to order and welcomed the committee members and the audience to the meeting. She then asked committee members and staff to introduce themselves, and they did. Senator McSorley expressed the importance of the subject

matter of the meeting.

### **History of the Tobacco Settlement**

Sandra Adondakis, New Mexico government relations director, American Cancer Society Cancer Action Network, started with a PowerPoint handout of the history of the Master Settlement Agreement (MSA). (See handout marked Agenda Item 2.) She referred to a chart on slide 4 and explained that the federal Centers for Disease Control and Prevention (CDC) recommended annual funding for tobacco control in New Mexico is \$23 million, but New Mexico only spends \$5 million to \$6 million annually. A majority of the MSA annual payment goes to the Department of Health for the Tobacco Use Prevention and Control (TUPAC) program.

She then explained that the state receives funds annually from the MSA, which is the result of litigation in which 46 states sued big tobacco companies. While this money is intended to help compensate states for health problems caused by tobacco use, the MSA does not require states to use the annual payments to pay for these health problems.

Ms. Adondakis explained that each year, the state receives around \$38 million, half of which by statute must go into the Tobacco Settlement Permanent Fund. The other half can be spent on a variety of health-related programs such as Medicaid or breast cancer screening.

A committee member asked Ms. Adondakis to confirm whether, by estimate, half goes into the permanent fund and the other half goes into programs. Ms. Adondakis explained that, depending on the financial condition of the state, annual payments have been diverted from the Tobacco Settlement Permanent Fund. She noted that over the last few years, the settlement money has been used to shore up Medicaid, for example. Ms. Adondakis said that the original statutory scheme was to build up the Tobacco Settlement Permanent Fund and collect interest on the fund in order to pay for programs.

A legislator explained that the MSA resulted from private litigation against "big tobacco" for misrepresentation of the health effects of smoking. He explained that Congress created the MSA to protect the tobacco industry from being bankrupted from piecemeal litigation.

Ms. Adondakis said that New Mexico is fortunate to have a comprehensive and effective tobacco prevention program. She explained that tobacco control has been studied extensively; cessation has been studied since the first surgeon general's report. Because of this, she explained, tobacco control program funding recommendations from the CDC are evidence-based. New Mexico decreased tobacco control funding in fiscal year (FY) 2011 and FY 2012 and should restore tobacco control funding to pre-recession levels, according to Ms. Adondakis.

Ms. Adondakis then referred to slide 5, which explains how funding tobacco control saves money and lives. When adequately funded and comprehensive, tobacco control programs reduce tobacco use, save lives and cut smoking-related health costs. She said that states with

sustained and well-funded prevention programs, such as New York, have reduced youth smoking by 45% to 60%. When tobacco control program funding is cut, in many cases tobacco use has stopped declining (as in California) or has rebounded (as in Florida). She said it is necessary to sustain funding over time in order to protect initial gains and achieve further cuts to smoking rates. Slide 7 indicates progress made in the United States and specific states, including New Mexico, in terms of decreasing adult smoking. Ms. Adondakis explained that it is important to know who is smoking, and she referred to slide 8, which shows that adults with the lowest income rates have the highest smoking rates.

D Ms. Adondakis proposed that the legislature:

- restore funding to tobacco control programming;
- return to saving 50% of MSA payments in the Tobacco Settlement Permanent Fund;
- cover comprehensive cessation services through Medicaid; and
- increase the tax on non-cigarette tobacco products.

Ms. Adondakis then referred the committee to the TUPAC program report. (See handout marked Agenda Item 2.)

R Returning to the PowerPoint handout, Ms. Adondakis explained that the MSA requires participating manufacturers to contribute to the fund. This cost is then passed on to the consumer, effectively raising the price of cigarettes. Ms. Adondakis said that this is important when controlling tobacco use among youth, as they are especially sensitive to price increases. The agreement also includes placing restrictions on advertising and promotion; providing states with funds that can be used to prevent tobacco use; and establishing the American Legacy Foundation, which is dedicated to reducing youth tobacco use.

A Ms. Adondakis then addressed MSA advertising and marketing provisions that include a prohibition on targeting youth for tobacco advertising. She explained that the definition of "youth targeting" takes into account advertising volume, population exposure and the percentage of youth readership of the advertisement medium in question.

F Flavored cigarettes and the use of cartoons appeal to children and can be interpreted as youth marketing. Some tobacco products have the same colors and designs as child-friendly products, which she said can be interpreted as youth targeting. The federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) bans flavored cigarettes. Ms. Adondakis said that there are flavored tobacco products that are not cigarettes.

T A committee member asked whether "youth" means under 18 years of age. Federal law has set 18 as the minimum age for tobacco use. Another legislator asked about the age of initiation of tobacco use. Ms. Adondakis said that this usually happens in a person's early teenage years. An objective of tobacco control programs is to delay first use to people over age 19 because at that age a person is less likely to use tobacco. Ms. Adondakis also noted that state laws prohibit young people from purchasing tobacco but not from possessing tobacco because

penalizing possession is not considered to be a best practice. She said that establishing tobacco-free environments helps discourage tobacco use by youths.

A committee member asked about the application of state tobacco laws on tribal lands. Another legislator suggested that the committee hear a presentation on tobacco use on tribal lands.

Ms. Adondakis noted that the use of celebrities and famous sports teams to advertise tobacco products is also banned. There is a limit on the use of tobacco brand-name sponsorship. Electronic cigarettes (e-cigarettes) are not prohibited from sponsorship as cigarettes are. The MSA also eliminates outdoor and roadside advertising because of concern over how highly visible these types of ads are. Ms. Adondakis said that a study shows that youths are particularly susceptible to tobacco placement in movies, and this is also prohibited under the MSA. The MSA also bans tobacco brand-name merchandise and youth access to free samples.

Ms. Adondakis said that the MSA also bans tobacco companies from lying or misrepresenting facts, and it imposes limitations on lobbying by tobacco companies, but much is open to interpretation.

A minimum pack size of 20 cigarettes prevents the sale of individual cigarettes. A committee member said that she has observed sales of individual cigarettes around the state. Ms. Adondakis said that she would look into this and suggested that the committee member might have seen cigarette-sized cigars that are sold individually, that can be flavored and that often look like cigarettes.

Ms. Adondakis noted that the Tobacco Control Act requires face-to-face sales, proof of age and a minimum package size. It is illegal to offer self-serve tobacco sales; the sale of tobacco has to be clerk-assisted, which helps avoid theft by young people. She said that the Tobacco Control Act grants the federal Food and Drug Administration (FDA) jurisdiction over smokeless tobacco, cigarettes and roll-your-own tobacco. However, this authority has to be explicit, and so far, the FDA has not asserted its jurisdiction over e-cigarettes, cigars, pipe tobacco or novelties (strips, sticks, etc.). Ms. Adondakis said that the FDA tried to regulate e-cigarettes as a drug-delivery device but lost a challenge in court. She noted that big tobacco companies have purchased e-cigarette companies, which is of concern. (See handout under Agenda Item 2.)

Ms. Adondakis said that the FDA needs to determine whether e-cigarettes are safe for use and are effective for cessation of smoking and whether the FDA will regulate them as a nicotine replacement. She said that people may hear that e-cigarettes help people quit smoking, but the long-term health effects are unknown. She explained that there is concern over e-cigarette advertising campaigns that advertise e-cigarettes as a cessation tool when this has not yet been scientifically proven.

## **Questions and Comments**

A committee member asked whether a person has to be over 18 to purchase tobacco products on a reservation. Ms. Adondakis said that she is not sure.

Another legislator asked whether the Tobacco Control Act applies on reservations. Ms. Adondakis said that she is not sure.

A committee member compared the e-cigarette delivery system to the use of vaporization as a delivery system for medical cannabis.

Another legislator asked whether most e-cigarettes are sold online. Ms. Adondakis explained that she did not know what the specific sales percentage of online sales of e-cigarettes is, but that e-cigarettes are widely available.

## **Update on the MSA**

Ari Biernoff, assistant attorney general, Litigation Division, Office of the Attorney General, went over the terms of the MSA and gave an update on recent proceedings. (See handout under Agenda Item 3.)

Mr. Biernoff explained that through the MSA, signatory tobacco manufacturers are required to abide by regulations and pay into a settlement fund. He said that in New Mexico, tobacco-related health care costs are well over \$400 million annually but that the annual settlement payment the state receives is less than one-tenth of that.

Signatory manufacturers were concerned that nonparticipating manufacturers would have an unfair market advantage. Participating manufacturers require that states pass statutes to require nonparticipating manufacturers to make annual deposits into an escrow account. This, they believe, levels the playing field. The state does not receive or have access to these escrowed amounts. New Mexico passed an escrow statute and must diligently enforce the escrow requirement to obtain the full amount of MSA annual payments.

Under the MSA, the participating manufacturers have the right to challenge a state's escrow statute enforcement record. Mr. Biernoff reported on the MSA arbitration in which New Mexico recently participated. The Office of the Attorney General is awaiting a ruling from the arbitration panel. The ruling is expected in the next few months.

## **Questions**

In response to a question, Mr. Biernoff explained that the state gets 0.06% of the total annual amount of money that participating manufacturers pay into a global settlement fund. He explained that this percentage is roughly New Mexico's share of the nationwide cigarette market at the time of the agreement and does not change over time.

A legislator asked whether tribal lands are included in the escrow statute. Mr. Biernoff

noted that the MSA is complicated. He explained that in the escrow program, the money paid into the escrow account does not belong to the state. He said to think of the cigarette market as divided into two groups: (1) MSA participating manufacturers; and (2) nonparticipating manufacturers. Mr. Biernoff said the companies that signed the MSA do not pay escrow but, instead, pay into a global fund that then gets distributed to the states. The bigger states with more smokers get a bigger share. Those manufacturers that did not sign the MSA pay escrow. He noted that these companies have to establish a bank account, and the money stays in the account. The state maintains oversight over those accounts. Companies do not have to pay escrow for sales made on tribal land.

Mr. Biernoff explained that the nonparticipating manufacturers file quarterly reports with the attorney general. The Office of the Attorney General does not collect escrow, but it audits the manufacturers for compliance with escrow obligations.

A legislator asked how a state has jurisdiction over the companies, including operations on tribal lands. Mr. Biernoff explained that manufacturers are subject to New Mexico's laws and financial penalties for violating those laws if they sell products in New Mexico. Mr. Biernoff then explained that the tobacco product manufacturer is the party responsible for escrow payment; there are no known manufacturers on tribal land, so state jurisdiction to demand escrow payments from manufacturers on tribal land is not an issue.

A committee member asked how many companies did not sign the MSA. Mr. Biernoff said that when the MSA was first signed, there was no such thing as nonparticipating manufacturers, and some manufacturers entered the market after the MSA was consummated. Later-formed manufacturers that wish to participate can join the MSA. A later-formed manufacturer that is not an MSA signatory is subject to the state's laws governing escrow.

Several members were curious regarding whether the state could pursue litigation against nonparticipating manufacturers for state health expenditures related to tobacco use. Mr. Biernoff explained that the participating manufacturers still have a huge percentage of the market, and this would have to figure into a decision to litigate against nonparticipating manufacturers.

A representative for Native Trading Associates explained that his company is a nonparticipating manufacturer headquartered in New York that sells primarily on reservations in New Mexico. Litigation between Native American Trading and the state is pending on the issue of escrow.

A committee member asked about the amount of escrow paid by nonparticipating manufacturers in 2009. Claudia Ravanelli, special projects coordinator, Litigation Division, Office of the Attorney General, reported that nonparticipating manufacturers paid around \$1.4 million.

Albert Lama, chief deputy attorney general, Office of the Attorney General, explained

that a group of seven states sued by the participating manufacturers settled instead of proceeding to arbitration. Settling states are required to expand the scope of their enforcement obligations. He explained that New Mexico went to arbitration because the attorney general did not deem settlement to be in the best interest of the state.

Mr. Lama noted that the Office of the Attorney General audits every licensed cigarette distributor and that distributors are required to report all sales. He said the Office of the Attorney General has done a good job of regulating nonparticipating manufacturers in the last several years and has brought the number of noncompliant nonparticipating manufacturers down to zero, amounting to almost total compliance. Mr. Biernoff reported that the Office of the Attorney General has filed 15 enforcement actions against nonparticipating manufacturers but that some of these actions will be uncollectible because some companies go out of business and are judgment-proof.

A committee member asked Mr. Biernoff to provide copies of the tobacco-related bills the governor vetoed in 2011 and 2012 and asked what the fiscal impact of those bills was. These bills are posted under Agenda Item 3.

A committee member asked whether the Office of the Attorney General would allow a representative to attend TSROC meetings as he thinks this is important. Mr. Biernoff said he would look into this, and he also recognized the Taxation and Revenue Department (TRD) for its assistance in presenting the state's case at the arbitration.

A committee member said he would also like a person from the TRD at future meetings in order to provide more expert information to the committee.

### **History of the TSROC, the Tobacco Settlement Permanent and Program Funds and Appropriations.**

Ms. Mathis gave an overview of the history of the committee, the committee's duties and the tobacco settlement funds. Ms. Mathis explained that while money from the Tobacco Settlement Program Fund may be appropriated for health and educational purposes, the statute also enumerates expressly authorized programs. Ms. Mathis explained that in nine of the fiscal years since the creation of the Tobacco Settlement Permanent Fund, no part of the annual MSA payment has been retained in the Tobacco Settlement Permanent Fund. (See handout under Agenda Item 4.)

Dr. Tom Pollard, Ph.D., former legislative fiscal analyst, discussed what has happened with the Tobacco Settlement Permanent Fund. He said that the intent of a permanent fund is to build the corpus and spend the earnings. He reiterated that 50% of the annual MSA payment was intended to stay in the permanent fund and 50% was intended to go to the program fund. Dr. Pollard then went over his handout, which is marked as Agenda Item 4.

Dr. Pollard indicated that page 4 of his handout contains a 2013 bill asking the legislature

to restore funds diverted from the permanent fund. If this bill had passed, Dr. Pollard said, the fund would have gained about \$74 million over the next 13 years. He said that 50% of the MSA payments are supposed to go to the permanent fund until such as time as 4.7% of the amount that is in the corpus exceeds the annual payments, and then all of the annual payments go into the permanent fund. Then it will fund programming in perpetuity. He said the failure to save a portion of each annual payment in the permanent fund has prevented this from happening.

Dr. Pollard explained that page 14 includes a graph for the general fund final summary based upon legislation that passed the house and senate. He said that during rough economic times, the state's reserves declined, and to shore up the state's credit rating the permanent fund was made a part of the reserves of the state. Dr. Pollard noted that the legislature can come in and tap the state's reserves to the full 9.9% indicated on page 14 of the handout, but as indicated on page 16, it is easier to access the general fund reserve.

The committee discussed bills introduced during the 2013 legislative session to use tobacco permanent funds to shore up the Lottery Tuition Fund and for early childhood programming. They also discussed the partial veto of SFC/SFC/SB 113 and SEC/SB 392.

#### **Appropriations and Review of 2013 Legislation**

Ms. Mathis brought the committee's attention to a packet entitled "Tobacco Settlement Fund Appropriations FY99-FY13". She then gave a brief review of certain 2013 tobacco-related legislation. (See handout marked Agenda Item 5)

#### **Review and Adoption of Interim 2013 Work Plan and Meeting Schedule**

The committee then discussed the work plan and voted to change the July 31 meeting to July 29, which will be at the University of New Mexico (UNM)-West campus in Rio Rancho. It was decided that the August 28 meeting in Albuquerque will be at the UNM Health Sciences Center cancer center. The October 7 meeting was moved to October 30, and the November 15 meeting to November 20.

Representative Trujillo was appointed as a voting member for the day to provide the committee with a quorum so that it could vote on these changes.

The committee then looked over the proposed committee travel budget. The proposed work plan and changes were adopted by a consent vote.

#### **Adjourn**

The meeting adjourned at 2:45 p.m.